

THE RULE OF LAW AND MEXICO'S ENERGY REFORM

**Accountability, Transparency, and Responsibility within the Scope
of the Energy Reform in Mexico**

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About the Study: The Rule of Law and Mexico's Energy Reform/Estado de Derecho y Reforma Energética en México

The 2013 changes to the constitutional framework and the summer 2014 enabling legislation in Mexico's energy industry represent a thorough break with the prevailing national narrative as well as the political and legal traditions of twentieth century Mexico. Mexico is about to embark on an unprecedented opening of its energy sector in the midst of important unknown factors, as well as a fiercely competitive and expanding international energy market. Mexico is one of the last developing countries to open its energy sector to foreign investment, and although there are important lessons that can be learned from other countries' experiences, this does not imply that the opening will be necessarily as successful as the government promises or that the implementation of the new laws will go smoothly. Almost certainly, after the enabling legislation goes into effect, important questions of law will emerge during the implementation, and unavoidably, refinements to the legislation will have to take place.

The book "Estado de Derecho y Reforma Energética en México," published in México by Tirant lo Blanch and written in Spanish, is the culmination of a major research effort to examine rule of law issues arising under the energy reform in Mexico by drawing on scholars and experts from American and Mexican institutions in order to bring attention to the different component parts of the new Mexican energy sector from a legal standpoint.

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Introduction

The energy reform represents a transformation in the understanding of the Mexican state and its role in the economic development of the country. This is a change comparable to the commercial opening that resulted from the signing of the North American Free Trade Agreement (NAFTA), and it poses similar challenges related to the modernization of the nationalized industry, the guarantee of international standards of effectiveness, quality assurance of supply, and the protection of the environment.

It is also important to recognize that the energy reform is taking place in a Mexico that has managed to consolidate its democracy through the alternance of power and reliable elections, although there is still work to be done to ensure unconditional respect of the rule of law. It is still necessary to reinforce mechanisms that make it possible to be aware of government activity, demand accountability for its actions, and fight corruption. Furthermore, in the hydrocarbons sector, some old union-based practices need to be discarded that have created procedures that are hardly efficient and result in abuses of power.¹ These elements are essential to achieving the modernization and development established as the goals of the energy reform.

Throughout the 21st century, constitutional and legal reforms have been carried out to strengthen public information access and accountability, which represents significant progress. Examples of this progress are the addition of the employer's liability clause to Article 109 of the Political Constitution of the United Mexican States (CPEUM) in 2002; the constitutional and legal changes of the so-called tax reform of 2008 aimed at consolidating budgeting for results; reforms in human rights affairs and writs of *amparo* in 2011; and the reforms of Article 6 in 2007 and 2013 aimed at strengthening the policy of transparency and providing the guaranteeing bodies with constitutional autonomy.

Nonetheless, as has been demonstrated by the Accountability Network's assessment, these mechanisms suffer from significant fragmentation (López, Merino, and Morales 2011), perhaps because their implementation has not yet been completed. Likewise, it should be noted that the weakest point of these procedures for the oversight of public work is still the responsibility structure. Although in 2015 there was a constitutional reform that sought to create a national anticorruption system,² it is clear that currently there is no comprehensive and efficient regulation in this matter. Today, these reforms have become urgent in light of the credibility crisis suffered by the government that has caused deterioration in the president's public image. He is no longer considered to be a great negotiator who, through the Pact for Mexico, succeeded in carrying out one of the most important economic reforms of the Mexican state; now, he is perceived as the head of a corrupt government whose conflicts of interest appear in the newspapers on a daily basis. This has caused a crisis of trust in all areas of government, which, without a doubt, has had negative effects on the consolidation of the energy reform.

Therefore, it has become necessary to analyze the regulation of procedures for the overseeing of authorities, the evaluation of the results of their actions, and, in cases of

corruption, the mechanisms used to apply the respective sanctions in such a manner that all participants can be certain that the actions of the Mexican state comply with the law. To this end, this paper explores the constitutional and legal standards regarding these oversight systems within the scope of the energy reform. We will start with an analysis of these regulatory structures through the identification of their areas of validity and the determination of their subject matters, subjects, procedures, and sanctions.³ We will also analyze whether these procedures are adequate in satisfying the constitutional principles that the energy reform establishes as the guidelines for activity in this sector. Once we have delineated the systems of transparency, accountability, and responsibility, we will identify some of the challenges and areas of opportunity presented by the legislation in light of both the constitutional principles and the major international practices in this area.

It should be clarified that this work focuses on the analysis of the state's governing bodies and public officials with respect to their obligations regarding transparency, accountability, and responsibility and does not address the problem of the necessary regulation of publicity or the oversight of the activities of the different market agents that will participate in the energy sector. Although it is of utmost importance to regulate the activity of these agents, because they are individuals their duties of transparency, their brand of accountability, and even their possible acts of corruption are guided by a peculiar logic and are mainly regulated not by the traditional bodies that control power within the government, but rather by other regulating bodies that were created for such a purpose.

The Rule of Law and the Energy Reform

The starting point for the regulatory analysis of the transparency, accountability, and responsibility structures is to understand them as tools to guarantee the rule of law. Although the expression "rule of law" is common for a diversity of legal systems around the world, it is a concept with many different facets. According to the Anglo-Saxon notion, the purpose of the rule of law is to cause everyone to submit to the authority of the law through the acknowledgement of the legal equality of both rulers and subjects. The German concept *Rechtsstaat* is a means for the strengthening of public power based on the understanding that only this reinforcement will make it possible to carry out the actions that are necessary to achieve the goals of the state. In the French system, its main goal is to limit public power in order to safeguard the freedoms of human beings. Thus, the essential elements of the rule of law are the division of power and the acknowledgement of a set of basic rights that exist prior to a constitution (Cossío, 2004). That the Mexican legal order aspires to be the materialization of the latter is accepted. In spite of the diversity of connotations of the rule of law, there is a general understanding that it is the control of the government by means of the law.

Authors such as Cossío Díaz deem that the concept of the rule of law requires a renewal through the incorporation of tools that make it possible to deal with new phenomena. Therefore, the rule of law is, more than anything, a linguistic construction of a social character through which an attempt is made to ensure that state bodies carry out determined processes and omit others to preserve a certain understanding of the rule of

law and the goal of the state (Cossío, 2004), as expressed in the constitution. Among these tools are transparency, accountability, and the fight against corruption.

Therefore, systems that oversee transparency, accountability, and responsibility are set up as elements of the rule of law. By increasing the capacity for the oversight of public power and fighting possible violations of the law, they are a means to supervise compliance with the very goals of the state.

In general terms, accountability refers to the oversight of the actions of state bodies that increases the need for the government to obtain results through substantive decisions because it allows for establishing the means to the end goals, and the suitability of the measures adopted (Cossío, 2004). In return, the obligation of transparency, which is related to the basic right of access to public information, provides information regarding the actions of the state for many different processes, such as voting for officials, budgeting, or national planning. Nonetheless, interdependence exists between the systems overseeing transparency and accountability, as the former provides the latter with indispensable input—information regarding the actions of the governing bodies—that represents the subject matter of the accountability system. Likewise, if an authority detects illegal acts committed by public officials during an evaluation of a state body's actions, it would be necessary to report them so that they are investigated and sanctioned according to the system of responsibility.

These systems therefore permit the control of authorities, increase the quality of public benefits, and may also shed light on acts of corruption. It should be pointed out that proper functioning of these elements of control requires that they are clearly distinguished, since they have different subjects, goals, and procedures. Throughout this article, we will analyze each of these systems within the scope of the energy reform and demonstrate both the need for clear differentiation as well as the negative consequences that result from their confusion.

In view of a constitutional change as significant as the energy reform, it is essential to establish procedures governing transparency, accountability, and responsibility that guarantee that the actions of the state bodies match the goals set out by the Mexican Constitution. Therefore, based on the explanatory memorandum of the energy reform, the guiding principles of its regulation are as follows: to guarantee international standards of transparency and accountability, as well as efficiently fight corruption in the energy sector.

Likewise, Article 25 of the Constitution specifies that the activities of productive state-owned companies must be governed by the principles of efficiency, effectiveness, honesty, productivity, transparency, and accountability and indicates that the laws must establish the mechanisms to guarantee these principles. The subsequent sections of this paper analyze the constitutional and legal standards regarding the energy reform that establish procedures for achieving transparency, accountability, and responsibility in light of the principles that, according to the Constitution, must govern the actions of all authorities in this sector.

Transparency in the Energy Reform

Since the start of the 21st century, transparency has become one of the key elements of Mexican democracy. According to international rules, transparency is identified with the mechanisms that guarantee access for any person to the information that is generated by the actions of any governing body of the state. In conceiving of the rule of law as democratic states in which the authority exercises power only on behalf of its sovereign people and within the limits set forth in the constitution, it becomes evident that citizens have at all times the right to know about the actions of their representatives.

Along this line, Article 6 of the Constitution and the General Transparency Act (LGT) establish the obligation to document any action carried out by government bodies using public resources and limits the amount of information reserved for reasons of public interest or national security. The purpose of this rule is to require that any action by a state body be documented and published, establishing maximum publicity as the guiding principle for these actions. This principle should be interpreted as follows: the general rule is to publish information, and information can only be reserved on an exceptional basis (López Ayllón, 2009). This means that every time information is reserved, the authority in question must carry out a damage test; that is, he or she must determine the reasons for reserving the information and weigh the effective damage that would be caused by its disclosure (LGT Articles 108 and 109).

The CPEUM and the LGT therefore strive to guarantee that the Mexican government be transparent; that is, that there are no obstacles to “seeing and knowing,” and that both citizens and public officials can observe the decisions made by the government, what resources are employed, how the available means are used, and what results ensue (López, Merino, and Morales 2011). All of the foregoing are for the purpose of ensuring that public decisions can be trusted.

Actually, to achieve this transparent government, it is important to overcome the logic of secrecy under which bureaucracies tend to operate (Arellano, 2008). Furthermore, it is important to remember that opacity allows bureaucracies to elude appraisal of its actions (Stiglitz 2003). This means that the challenge facing a system that oversees transparency is to successfully establish proper incentives for a bureaucracy to act in a transparent manner.

In the case of the energy reform, the change in bureaucratic conventions—a playing field on which both government officials and trade unions have taken advantage of opacity for many years—is not a minor issue, particularly insofar as productive state-owned companies are concerned, which are set up as a hybrid between the public and the private: they are bodies of the state, but they must compete in the market in an efficient and effective manner. This is why, according to Article 25 of the Constitution, secondary legislation had to establish procedures to guarantee transparency of the bodies involved in the energy sector. This system of transparency must establish an adequate incentives structure so that it becomes less costly for its bodies to disclose the information (Arellano and Lapore 2011) than conceal it.

Additionally, the transparency policy governing Mexican authorities must be guided by the rules of the Open Government Partnership (OGP), since Mexico has been a party to this multilateral initiative since 2011. The OGP is a transformative element influencing the manner in which government information is used and shared in order to improve the decision-making process.⁴ Furthermore, this partnership creates the challenge of achieving global access to public information. It strives to reinforce the idea that public information is an essential tool for good public decision-making, for interinstitutional cooperation, and for the promotion of citizen participation.

The OGP was designed as a type of government reorganization with the purpose of bringing together all agents involved in making public decisions through the generation and use of shared information. The right of access to information is thereby converted to a right of participation and assumes the use of information both by the citizens as well as state bodies. Therefore, information must be in an open format not requiring any software licenses, and must use clear language and easy access such that it actually promotes participation. As Albert Meijer (2013) points out, the main goal of transparency policies is to provide citizens with a vision and a voice. This task entails important challenges regarding the standardization of the manner in which information is presented and the methodological rigor with which information is collected and preserved, particularly in the case of specialized areas like those regulated by the energy reform.

The rules establishing transparency procedures should clearly specify at least four elements: a) the subjects—on one side, the state bodies responsible for generating and publishing information and, on the other, the identification of users and their requests for information; b) the objective of the system, which is to document all acts resulting from the exercise of power, and publishing them in a clear and simple manner; c) the procedure of gaining access, whether through Internet portals or via requests for access, a procedure that must be simple and expedient; and d) its purpose, which is to guarantee the human right of access to public information as a part of freedom of expression to promote interinstitutional cooperation and citizen participation in the making of public decisions.

Insofar as the energy reform is concerned, Article 25 of the Constitution establishes that, in terms of the planning and control of the national electricity system and of the public service of transmission and distribution of electric energy, as well as the exploration and extraction of oil and other hydrocarbons, the nation will carry out such activities by guaranteeing transparency, among other principles. Therefore, it was necessary to wait for secondary legislation to develop a transparency system for the sector that possessed the aforementioned characteristics.

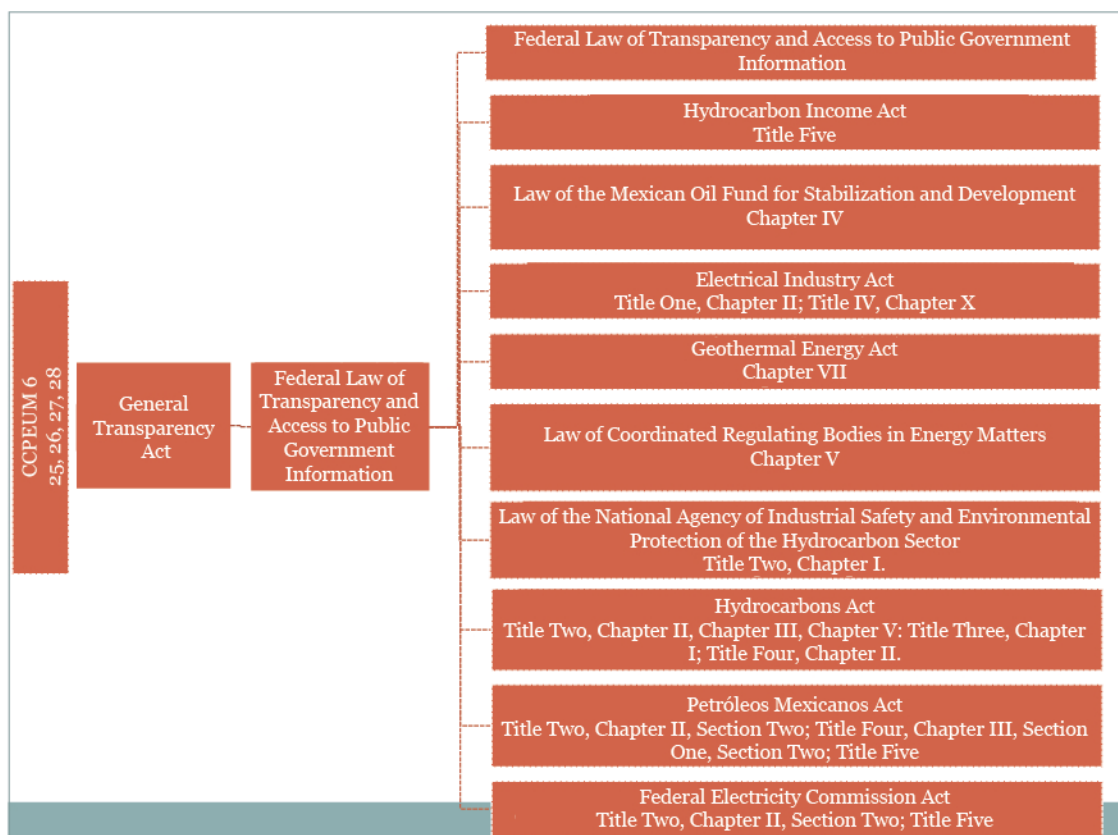
Unfortunately, the rules and regulations of the energy reform simply identify a series of requirements regarding the disclosure of information that are quite unclear and disconnected. Within the transitional articles of the constitutional reform, the permanent constituent emphasizes the need for secondary legislation to establish that all contracts regarding the exploration and extraction of hydrocarbons to which the state is a party must be granted through mechanisms that guarantee maximum transparency. In addition, both

bidding guidelines as well as rules and contracts must contain mechanisms for the publication and disclosure of the contractual terms, considerations, contributions, and payments set forth. Also, within the transitional articles, the permanent constituent expressly imposes upon the Mexican sovereign oil fund the transparency obligations that are established by Article 6 of the CPEUM and the corresponding law; furthermore, it orders the publication on the Internet of the financial results of assignments and contracts on a quarterly basis. Similar obligatory publication of quarterly revenue and expenditure reports is imposed in the transitional articles upon the National Agency for Industrial Safety and Environmental Protection (ASEA).

Since the constitutional reform, it has therefore been required that any actions within the energy sector be guided by the principle of maximum publicity. The regulation particularly emphasizes contracts, assignments, and revenue obtained by the Mexican State. In spite of this mandate, the secondary legislation seems to fall short in respect to the implementation of a transparency system that actually permits tracking public decisions regarding contracts and revenue obtained through these resources, as well as their final destination. In general, the laws limit themselves to reiterating that the principle of maximum publicity must govern this activity, such as in Article 158 of the Electrical Industry Act (LIE).

What we do find in respect to transparency regulation, as shown in the following table, is a set of rules within the different laws of the energy reform that, in a terse, confusing, and at times even contradictory manner, establish certain procedures and periods for disclosure of information without any clear identification of the bodies responsible for its publication, or the purpose and quality of the same:

Figure 1. Regulation of the Transparency System within the Scope of the Energy Reform



As shown in the graphic, according to the rules set forth by Article 6 of the Constitution, the regulation of the system of transparency throughout the entire country would be carried out by means of the LGT, which establishes a national transparency platform (LGT Articles 49-52) and determines, among other items, the parameters regarding what kind of information must be published by each and every state body in a proactive manner, the procedures of withholding information, the minimum requirements in terms of the quality of information, as well as the formats for publication of the accountability indicators of all obligated subjects. Actually, Article 83 of the LGT also establishes the rules of transparency obligations in the energy sector. On the other hand, even though the secondary laws of the energy reform indicate that they will comply with the pertinent laws insofar as obligatory transparency is concerned, it is confusing that the LGT and the Federal Law also come in to regulate both the obligations regarding the publication of information as well as the reasons for withholding information. Such dispersion of the standards and regulations creates confusion regarding which authority must comply with which obligation, and regarding how and where the information generated by each of the created bodies must be published. For example, Article 1 of the Hydrocarbons Income Act (LIH) specifies as one of its goals the obligations in matters of transparency with respect to the revenue that will be received by the Mexican state for the exploration and extraction of

hydrocarbons. Nonetheless, the transitional article of the constitutional reform establishes that the Mexican Oil Fund must submit a quarterly report. Article 58 of this law establishes that, on a monthly basis, the fund and the secretary of finance and public credit must publish detailed information on each contract in terms of amounts, volume, payments, and revenue. Article 61 again mentions the quarterly reports that must be provided by the Ministry of the Treasury, which must include the economic standing of the country and the revenue obtained—reports that must be public, according to the LGT. In turn, Articles 88 through 91 of the Hydrocarbons Act (LH) once again list information that the National Hydrocarbons Commission,⁵ the Energy Regulating Commission, and the Secretary of Energy must provide to the public: information regarding contracts, biddings, and assignments. Likewise, Articles 76, 85, and 109 of the *Petróleos Mexicanos* Act (LPM) specify the obligation to publish information regarding contracts and their providers in accordance with the Federal Law of Access to Public Information (LFAIP).

The situation in the electrical industry is similar. Article 11 of the LIE authorizes the minister of energy to issue a yearly performance report of the national industry. Article 159 specifies that the ministry, the Energy-Regulating Commission (CRE), and the National Energy Control Center (CENACE) will facilitate the transparency of information on the electrical market guided by the principle of maximum publicity, and Article 161 furthermore establishes that the ministry must create a special Internet site for the publication of information regarding contracts of productive state-owned companies, subsidiaries, or branch offices in Mexico or abroad.

As we can see, the transitional articles of the constitution and the secondary laws impose the same type of obligation for publication upon the Ministries of Treasury and Energy and upon the Mexican Oil Fund; they also establish different timeframes without justifying in any manner the reason for any difference. In the case of the electrical energy sector, the laws require a special portal where such information must be published, although they do not specify where such information will be available for the LIH and the Fund.

There is also no rule whatsoever in respect to the quality of information and the necessity for such information to be provided in clear language and in an open format to guarantee its usability. The foregoing is especially delicate because it is common practice to present these reports in PDF format, which makes them unusable (Métrica 2014) and violates the commitments established in the OGP Action Plan of 2013-2015. Even though the failure to regulate not only what information is presented, but rather the format in which it is presented as well as the practice of duplicating reports, is repeated throughout all secondary laws of the energy reform. This lack is especially delicate insofar as the regulation of the formats in Article 32 of the LH is concerned. This law establishes the National Center of Hydrocarbon Information, the body responsible for the collection, safeguarding, administration, and updating of information.

Despite the fact that it is recognized that the complexity of the industries regulated by the energy reform, particularly within the scope of a public-private partnership, requires that the rules and regulations in matter of transparency have certain particularities, the

dispersion and complexity of what we have stated so far is not justified. In this respect, proposals from organizations such as the Extractive Industries Transparency Initiative (2013) should be taken into account. They propose models for reports about resources from extractive industries that are uniform, understandable, and consolidated. Furthermore, it is desirable that such information be presented on a single website, in conformity with the requirements of the OGP Action Plan. In this respect, the efforts of the National Hydrocarbons Commission must be recognized, which, for the so-called “Round 1” bids, created a portal for the publication of any relevant information. The Commission has also set up a mechanism of communication with interested parties—a window where it receives recommendations and addresses them. Likewise, the decree establishing the regulation in matters of open data⁶ establishes that productive state-owned companies must publish their databases for the purpose of facilitating access, use, reuse, and redistribution via the portal (www.datosabiertos.gob). However, the proliferation of sites over which information regarding the energy sector is scattered continues, which ultimately renders the access to and use of the information difficult.

As a matter of fact, even on a regulatory level, the manner in which the information is scattered is worrisome, and the new LGT does not manage to resolve it. It is not even clear how public information on the energy sector will be linked to the National Transparency Platform,⁷ a site that supposedly will house public information related to all state entities. It is also not evident how the new LGT is related to the obligations set forth in the energy reform laws, the OGP Action Plan, or the decree regarding open data.

Another problem of the transparency system laid out in the energy reform is the treatment of withheld information. The laws provide for withholding some types of documents in a general manner and without any prior damage test. For example, Article 53 of the Geothermal Energy Act (LEG) plainly points out that information regarding plots of land with geothermal potential will be withheld. Article 21 of the Law of the Mexican Oil Fund (LFMP) establishes that information regarding evaluations, estimates, and analytic methodologies that are carried out by the fiduciary is withheld. Furthermore, it establishes, in an ambiguous manner and giving great leeway to the authority, that “information that puts the Fund at a disadvantage or that benefits a third party with respect to the investments or operations of the fiduciary will be withheld.” This violates good international practices as well as the resolutions of the Supreme Court of Justice of the Nation, which mandated all authorities to carry out the damage test in each case of information withholding. Said test consists of the duty of the authority to weigh and evaluate whether or not it will provide the information based on the proper justification and motivation. The withholding must “be related to the damage test, in an objective manner, in terms of whether the disclosure of the information creates a risk or may cause a loss.”⁸

The secondary laws of the energy reform do not specify the bodies that are authorized to withhold information, nor whether transparency committees will be set up that could review these decisions. They also do not regulate where and how frequently the list of withheld information must be published. This is particularly worrisome when considering that Article 6, Section VIII of the Constitution indicates that it will be the LGT that

establishes the scenarios for the withholding of information. In addition to being ambiguous and creating undue discretionary power that allows for the withholding of information in each law of the energy reform, its constitutionality may even be questioned. In this respect, the LGT falls short, since it establishes that the acts of withholding set forth in other laws must comply with the LGT; the ideal situation would have been that the withholding of information would remain exclusively regulated by this national legislation.

Another deficiency of the secondary legislation is that the different laws address the procedures of transparency, accountability, and responsibility within a single chapter and practically without any distinctions. This is a common problem both in academic circles as well as in public practice. The three concepts tend to be used as synonyms or are understood as mechanisms that are automatically linked. Therefore, it is essential to emphasize that they are systems that are not equivalent, even though they reinforce each other. It cannot be said, for example, that a regime is accountable because it responds to requests for information that are made by citizens or because the authorities submit a yearly report which nobody evaluates and whose results do not hold up. As a matter of fact, this is what happens with the energy reform. It is exactly the case of the yearly report presented by the board of directors set forth in Article 113 of the LPM and Article 116 of the Law of the Federal Electricity Commission (LCFE), the evaluation set forth in Article 117 of the LPM and Article 120 of the LCFE to be carried out by a commissioner appointed by the president, or the report prepared by the external auditor of the Mexican Oil Fund according to Article 22 of the LFMP. Such reports only comply with certain obligations of transparency, although it can not be claimed that with the filing of these reports the authority is held accountable, since nothing is said with respect to the principles guiding their preparation, the purposes of the evaluation, or the consequences and sanctions resulting from the same.

In the following sections, we will address the elements making up the accountability and responsibility systems as well as their regulation within the energy reform in more detail. We will furthermore demonstrate the consequences of the confusion between the procedures and some of the deficiencies that the regulation entails.

Accountability in the Energy Reform

Having an accountability system in place is an indispensable element of the rule of law. As soon as the election of rulers has been guaranteed through universal vote and reliable procedures, it is necessary to have mechanisms that make it possible for the state bodies to be held accountable for the exercise of power that has been conferred upon them. Any state body must subject its actions to the rules enshrined in the Constitution as the supreme law of the land. Therefore, the accountability system must contain procedures for the control of power to ensure that this actually happens.

As a matter of fact, under the rule of law, accountability becomes an essential mechanism for appraising the actions of any state body, not only with respect to formal compliance with legal limits, but also of the results that are obtained, since it requires efficient and

effective performance. This requirement is also translated in the law from its conception, not only as a limit of power that permits the exercise of individual freedoms, but also as a set of material guarantees of a minimum level of well-being through the protection of the human rights contained in the Constitution (Ferrajoli 2008). It therefore imposes an obligation to have legal procedures that analyze and qualify actions of the state from this perspective, which makes up the accountability system.

In this respect, it is possible to legally conceptualize accountability as the set of rules that establish procedures of control of a state body that is under the obligation to report, explain, and justify its actions to an independent agency authorized to analyze the acts, qualify them as legal, and ensure their compliance with constitutional rights and principles.

As established by Article 25 of the CPEUM, in the case of the energy reform, the generation and distribution of electric energy as well as the exploration and exploitation of oil and other hydrocarbons must be carried out with efficiency, effectiveness, and a level of productivity based on the best international practices. Likewise, the constitutional reform specifies, among its goals, promoting the development of society and the protection of the environment through the modernization and strengthening of productive state-owned companies, keeping the ownership of hydrocarbons and the control of the electrical system in the hands of the nation, guaranteeing international standards of efficiency, quality, and reliability in terms of supply, solidifying the administration of petroleum revenue, promoting long-term savings, and effectively fighting against corruption in the energy sector.

Therefore, the accountability system developed in the secondary legislation had to establish the procedures through which the Mexican people would be able to ensure that constitutional principles were complied with and that the goals established in the reform were met, meaning that it should have determined the independent authority designated to evaluate the results of activities in the energy sector and by what mechanisms it would ensure compliance with the principles of quality, reliability, effectiveness, and efficiency.

Quite to the contrary, and just like in the case of the transparency system, the energy reform regulates the accountability system through a series of unconnected rules within the energy reform legislation, in addition to referencing the Federal Law of Budget and Financial Responsibility. As a result, neither the procedures nor the responsible bodies are clear. Despite the fact that Transitional Articles 9 and 20 of the Constitution stipulate that the secondary legislation must establish, at least for productive state-owned companies, a system of external audits (which is also recommended by international practices)⁹ and monitoring and accountability mechanisms, these devices are hardly mentioned in the energy reform legislation. Article 57 of the LPM only specifies that it will be the very board of directors that will appoint the external auditor as proposed by the auditing committee. As long as it is the owner of the very body being audited who appoints the external auditor, there appears to be no autonomy of the auditor. Moreover, the requirements that must be covered, the purpose of the audit, and the possible consequences of any result are not indicated at all. Therefore, and in accordance with the definition of accountability provided above, neither the auditing

committee nor the external auditor is, in reality, an independent authority that analyzes, appraises, and establishes consequences for the results obtained by Pemex. Insofar as the LCFE is concerned, in Title Three it regulates both internal as well as external audits in exactly the same manner and with the same limitations.

Actually, a suitable accountability procedure for this type of activity within the Mexican legal system is the public account, which is the responsibility of the Chamber of Deputies by means of the Office of the Superior Auditor of the Federation (ASF), since it deals with the most important audit of the generation and the use of federal public resources. Even though any public resource must be covered by an evaluation through the public account according to Articles 74, 79, and 134 of the CPEUM, the secondary regulation of the energy reform is not clear with respect to the form or manner in which this is carried out. Both the LPM and the LCFE recognize the public account as the accountability procedure that the company will be subject to. Articles 58 and 56, respectively, establish that the ASF will be responsible for supervising the actions of PEMEX, CFE, and their subsidiaries in accordance with the provisions set forth in the Constitution and the new nature of these companies. However, the quoted articles point out that, in addition to the new legal framework, “the results of the reviews that, in the exercise of their functions, are carried out by the auditing and supervisory entities” must be taken into account; what is unclear, therefore, is whether the ASF is expected to only analyze these results or whether it will be allowed to conduct its own audits. In the first case, its hands are practically tied, and it will hardly be able to carry out a reliable evaluation of the results to determine whether they are operating effectively and efficiently.

Both external as well as internal audits conducted in accordance with international practices contribute to better governance of an institution and allow the owners of the same to identify areas of opportunity in terms of organization and internal processes.¹⁰ However, they fall short with respect to the purpose of accountability, considering that they do not usually analyze compliance with the constitutional purposes set forth for that body, and they lack the competency to determine sanctions based on the results.

Therefore, in the energy reform legislation, we find sections or chapters designated “accountability” that only contain a set of isolated and ambiguous rules ordering the preparation of reports without determining their purpose or their consequences. Furthermore, the specified audits do not indicate their actual purpose or, the consequences of their results, and the body conducting them is not an autonomous authority capable of guaranteeing an impartial analysis aimed at verifying compliance with the purposes and principles required by the Constitution, nor is it authorized to apply any sanctions. There is therefore no accountability system for the energy sector that makes it possible to evaluate its progress, acknowledge good practices, and amend errors. There are also no clear procedures for monitoring its performance as mandated by the Constitution.

Imposition of Responsibility within the Scope of the Energy Reform

As pointed out earlier, it is common to conflate the accountability system with mechanisms to prevent and fight corruption. According to Behn (2001), it is incorrect to believe that accountability serves to punish corrupt officials rather than evaluate the actions of state bodies in accordance with the requirements of the Constitution and the laws. This error is based on the frequent confusion between a state body and the official or officials who temporarily hold offices within them. An official who holds public office does not act individually, but rather executes the powers that the Constitution and the laws vest in the agency; therefore, the consequences of these actions are attributable to the agency itself and not to the official. The actions of the agency are the result of the set of its powers and the public resources that are used. These actions are covered by the accountability system, whose purpose is to evaluate the results and determine consequences with respect to the agency itself.

Now, when an official abuses his or her office, that is, he or she engages in illegal conduct that must be punished, such illegal conduct is covered by another legal system. Any legal order must have a system to prevent and fight corruption; this system responds to a rationale that is distinct from that of the accountability system, and its subjects, subject matter, and procedures are different. According to authors such as Persson, it is incorrect to consider corruption to be an agency problem. Relationships of corruption, particularly when the corruption is systematic, as it is in Mexico (Casar 2015), represent a problem of collective action where there is no principal who is actually interested in whether the actions of officials are straightforward and honest. On the contrary, there are incentives for anyone who can to make private use of public resources (Persson 2010) such that the establishment of monitoring mechanisms such as internal or external audits yields ineffective results, if what is sought is preventing and sanctioning illegal acts.

The responsibilities system is based on the idea that an individual must be responsible for his or her actions. Bovens (1998) clarifies that the term ‘responsibility’ has several meanings when referring to the manner in which an individual should act: the individual is ‘responsible’ because he or she is rational, because he or she has the aptitude for the task, or because the actor’s conduct is based on a certain ethical code.

Weber also emphasizes the need for virtuous actions from the bureaucracy and indicates that a bureaucracy operates like a hierarchical structure, with relationships of subordination wherein those on the upper levels supervise those on the middle and lower levels. Furthermore, there is a relationship of loyalty from those lower in rank toward their superiors (Weber 1919). On one hand, the purpose of such a hierarchy is to prevent illegal acts by promoting shared values and, on the other hand, to establish internal disciplinary procedures by applying administrative sanctions, both of which are intended to provide an incentive for virtuous acts from public officials.

Article 25 of the CPEUM refers to honesty as one of the principles that must govern the energy sector. This principle must be interpreted as being aimed at public officials

involved in these activities. In turn, the explanatory memorandum specifies, among the basic goals and premises of the reform, the intent to “fight corruption in the energy sector in an effective manner.” Transitional Article 21 of the constitutional reform emphasizes the need to adjust the legal framework to “prevent, investigate, identify, and severely punish” any public or private agent who engages in acts or omissions that are contrary to the law or whose purpose is to obtain an undue benefit.

Secondary legislation should, as we have said, establish the jurisdiction and the procedures to prevent, investigate, identify, and punish these illegal conducts. In contrast, and as with the structures for transparency and accountability, an analysis of the chapters on sanctions in the energy reform shows a high dispersion of these standards across all laws.

Furthermore, the secondary laws of the energy reform repeat the traditional scheme of the Mexican legal order and establish a series of scenarios that confuse agency obligations with illegal acts; for specific examples, see Title V of the LIE, Chapter II of the LH, and Chapter V of the Law of the National Agency of Industrial Safety and Environmental Protection in the Hydrocarbon Sector (LANS).

In general, there is an ambiguous inventory of conducts and sanctions with unclear procedures that confuse the authorities who investigate with those who judge, and, in addition, do not guarantee the independence of the sanctioning authority. It is necessary to clearly define the procedures for investigating corruption in order to avoid frequent violations of due process that result in judicial decisions becoming void. The Supreme Court has insisted that the procedure for administrative sanctioning must meet the standards of due process according to criminal law, since its effects could have a personal and direct impact on the assets and even on the freedoms of the person once he or she is removed from office and disqualified.¹¹ Therefore, it is important that procedures be established that respect the separation between the authority that investigates and the authority that judges, and that also ensure due process. National Anticorruption System laws enacted in August 2016 have advanced in this matter. Nevertheless, it remains to be seen how these laws will be applied throughout the entire energy sector.

With respect to preventing corruption, the laws of the energy reform contain some interesting innovations. For example, they expressly establish the scenarios that can be considered conflicts of interest for the counselors of the Fund (Articles 9 through 15 of the LFMP), regulating bodies (Article 9 of the Law of Coordinated Regulating Bodies in Energy Matters [LORC]), and productive companies (Article 21 of the LPM, Article 20 of the LCFE). They further indicate the mechanisms for the dismissal or removal of a party in cases where a conflict of interest arises.

Another advance is the obligation to issue codes of conduct that seek to promote virtuous actions of officials. For example, Article 15 of the LORC indicates that the institutional values are righteousness, honesty, impartiality, respect, and transparency. Article 95 of the LPM states that the board of directors will issue a code of ethics and will determine the bodies responsible for ensuring compliance.

For the prevention of corruption, it is also essential to have measures in place to protect those public officials or individuals who wish to report mismanagement and misappropriations. Whistleblowing protection is especially relevant when reports are taken into account such as the *Report to the Nations On Occupational Fraud and Abuse 2014* by the Association of Certified Fraud Examiners (ACFE), a document identifying the mining, gas, and hydrocarbon industries as those with the highest average loss due to fraud. This report further points out that the main source of reports of fraud are anonymous, even over the phone, and that 40% of the reports come from employees.¹² In this respect, the energy reform also presents some innovations; for example, Article 37 of the LORC establishes the creation of a system for the receipt of anonymous reports and complaints, although it seems to be limited to contracting processes.

Although the energy reform has made some progress with respect to the responsibility system, there are also significant omissions. Both the LPM (Articles 30 and 31) and the LCFE (Articles 29 and 30) exempt all members of the board of directors, including secretaries of state, from observing the proper responsibilities of public officials (Title IV of the CPEUM), among them administrative and compensatory responsibilities. In reality, these articles limit liability to civil damages and losses, which is absurd. It cannot be justified that such executives would not be subject to either administrative and compensatory or criminal liability, as the case may be, with respect to their actions within the productive state-owned companies, where they handle federal public resources and national goods. When their acts and omissions can cause damage to public funds, it should be asked why it is sufficient that they merely repair said damage when, under equal circumstances, other officials can be removed from office and disqualified from holding another. While it is certain that PEMEX and CFE are companies, unlike what happens in a private company, their Boards of Directors do not make decisions regarding the resources of individuals, but rather regarding public resources and goods belonging to the nation. This is not a case of private interests that can be identified with a principal who is concerned about monitoring them, but rather of common goods that belong to all Mexicans. The mechanism for requiring a public officer's responsibility should have been regulated in the same manner as the committee specified in the LFMP, which has a chapter regarding the responsibility of the committee, refers to the Law of Inspection and Accountability of the Federation, and holds all members administratively liable for the damage and losses they cause.

In summary, although provisions for anonymous reports and codes of ethics can be considered progress in the fight against corruption, the ambiguity in the typification of conduct, procedures, authorities, and sanctions are weaknesses that reduce the efficiency of the responsibility system of the energy reform.

Challenges to the Implementation of the Energy Reform

The analysis of the regulations regarding transparency, accountability, and responsibility within the scope of the energy reform demonstrates that, in these areas, the problems of the fragmentation and ambiguity of the Mexican legal order reiterate and place the proper functioning and results of the energy sector at risk.

The legal transparency system should not be limited to only providing information but should be understood to be a part of human rights and of superior value in a democracy (Salazar 2008); thus, the transparency obligation is not fulfilled through the mere presentation of periodic reports, but must rather be understood as a deliberate policy of the state to systematically produce and use information as a strategic recourse (López and Merino et al. 2010). It is important to properly adopt the stipulations in the OGP Action Plan 2013-2015, particularly insofar as the association of Mexico with the Extractive Industries Transparency Initiative is concerned. These actions strive to provide clear, simple, and reusable information in open and uniform formats within the scope of networks with interests connected within the energy sector—for example, resource supervision, participation in public decision-making, or environmental protection. This aims to strengthen the effects of public policy as a result of the presentation of such information and its analysis from multiple perspectives and from different nations (Haufler 2010). Therefore, it should be a priority for the agencies responsible for overseeing the energy sector to articulate a proactive transparency policy that has these characteristics.

The fragmentation of the transparency system actually could be reduced as long as the entire energy sector follows the provisions of the LGT and the Federal Transparency Act. In reality, it would be appropriate to repeal all special rules contained in the energy reform and bring all sector authorities under the LGT. This would both improve the gathering of information on the National Transparency Platform as well as eliminate the reasons for the withholding of information presented by these energy laws. Likewise, the duty of all agencies to establish transparency committees that only withhold information after a damage test would be made clear.

Insofar as accountability is concerned, it is necessary to strengthen the ASF as an autonomous technical body so that it has the actual capacity to evaluate the performance of all agencies involved in the energy sector by means of the public account. To be able to do so, it is important to promote the legislative changes that permit this strengthening, as well as the adjustments of the review procedures that aim to ensure that the results of the public account impact subsequent decisions regarding the budget and planning of the sector. In this respect, it would be advisable to have specialized agents in the ASF in charge of supervising the energy sector, so that they would not be limited to the results of audits currently specified by the relevant laws.

It is desirable that, in addition to establishing committees of internal auditors and providing for external audits, provisions be established within the legal scope of the ASF

for the purpose of providing it with material and human resources to supervise these productive state-owned companies, their revenue, and their expenses. This is particularly important when taking into account that Articles 59 through 61 of the LIsH specify that the resources entering the Fund are to be included in the Account of the Public Federal Treasury. Likewise, the exercise of public resources that will be carried out by the regulating bodies and by the National Agency of Industrial Safety and Environmental Protection must comply with the government budget and accounting rules and regulations and should be revised in the public account. Likewise, considering that the ASF also conducts a performance evaluation, it should have the capacity to investigate the sector in accordance with the goals set forth in the Constitution regarding social responsibility and environmental protection, aspects of global interest whose improvement is subject to increasing international pressure (Clip 2005).

Insofar as the responsibility system is concerned, the preventive measures in the reform, such as the declaration of conflict of interest, ethical codes, and anonymous reports, try to reestablish public trust in the actions of public officials, which is urgent due to Mexico's current circumstances. Furthermore, it would be desirable to have a career civil service for the energy sector that would allow for the professionalization of public officials and create proper incentives for effective, efficient, and honest performance.

In order to reduce the fragmentation of regulations in matters of responsibility, it would be advisable to repeal the chapters in the energy laws regarding sanctions and to regulate all public officials involved in the sector as being bound by political and administrative responsibilities under the new General Law of Administrative Responsibility enacted in August 2016. Unfortunately, even after these recent reforms, Mexico still lacks a legal system that effectively identifies illegal acts and crimes attributable to public officials and establishes the necessary authorities and efficient procedures for investigating and punishing illegal conduct. Developing this legislation and, of course, including the energy sector within it is an urgent matter.

The energy reform can be a transformative element for the Mexican economy and a motor for the development of the country. However, this requires that everyone involved be able to trust that the government and the companies act in conformity to the Constitution and in an honest manner. This will only be achieved with the proper functioning of transparency, accountability, and responsibility legal systems that guarantee the proper knowledge and monitoring of the exercise of power. Therefore, bringing the energy reform to a successful conclusion entails guaranteeing the respect of the rule of law in Mexico. Although there has been progress, arduous work still lies ahead to ensure the adequate implementation of the three systems and eliminate the fragmentation of the procedures demonstrated in this article.

Electronic Resources

www.transparenciapresupuestaria.gob.mx/es/PTP/Datos_Abiertos
www.datosabiertos.gob
www.metricadetransparencia.cide.edu/

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Endnotes

¹ Mexico was characterized, during the twentieth century, by the institutionalization of various forms of corporatism from the highest spheres of power with large trade unions such as those of Pemex, Luz y Fuerza del Centro, or the Teachers' Union. Since their birth, these bodies have been powerful political organizations that were unconditional allies of the government, despite the fact that they achieved rights and concessions for their workers. The political use of trade unions resulted in significant corruption, which affected the quality of their services and the effectiveness of the institutions. This factor, along with the collapse of the Mexican economic model in the 1990s and the pressure of globalization, made corporatism unsustainable as a mechanism of political control. This made it necessary to think about new forms of worker organization in accordance with the requirements of a global market. As pointed out by Jaime Cárdenas (2014, 152), in the particular case of PEMEX, trade union corruption caused the worker representative to be removed from the Board of Directors within the scope of the energy reform will. For a complete overview of this phenomenon in Mexico, see Meyer (1989) and Bizber (1990).

² At the end of 2014, the PAN, the PRD, and the PT presented their constitutional reform initiatives for the purpose of creating a national anticorruption system. This was not only in response to the corruption scandals and the abuse of authority that were all over the media (Casa La Palma and Grupo Higa, among many others), but rather due to the pressure exerted by an organized civil society and academia through organizations such as the Accountability Network, Fundar, México Evalúa, and Mexican Transparency, which demonstrated the weakness of the existing institutional mechanisms in effectively fighting influence peddling, illegal enrichment, and conflicts of interest. The regulation in effect until this time is limited to a mere listing of public officials, obligations, and errors, without any clear procedures, as a result of which its efficiency is very limited.

The Mexican Senate held different working tables combining the proposals both of legislators as well as the civil society to generate a draft of the reform. The report by the Senate indicates that fighting corruption was crucial for structural reforms. It notes that according to the National Index of Corruption and Proper Governance, in 2010 alone improper payments for official processes and public services reached thirty-two billion Mexican pesos. This situation made it urgent to adopt measures to not only punish acts of corruption but also identify the processes that allowed for unjustified discretion in such a manner so that they could be corrected within the public administration. Therefore, the constitutional reform builds a system, coordinated among the three branches and incorporating citizen participation, that strives to establish public policies to prevent corruption as well as fight and impose sanctions on it. To do so, the National Anticorruption System was established, which is a coordinating instance between the authorities of all levels of government with the purpose of adopting measures to institutionally prevent corruption. Likewise, it strengthens the Ministry of the Public Function in terms of internal control and the Main Comptroller of the Federation in terms

of monitoring the use of public resources, with the possibility of preparing individual reports and filing a suit before the special inspector whenever the existence of crimes of corruption is presumed. Furthermore, it authorizes the Federal Court of Administrative Justice to impose administrative responsibilities and impose sanctions. As of the date of the writing of this article, the laws that will implement the National Anticorruption System are still pending.

³ If the accountability system is a set of standards, it is possible to identify them based on their areas of validity. According to Kelsen, validity refers to the specific existence of a standard that depends on having been created through the procedures and the bodies authorized to do so. The standards can be analyzed in four areas of validity, to wit: personal, material, spatial, and temporary (Kelsen, [1960] 2002: 45).

⁴ See <http://www.opengovpartnership.org>.

⁵ It should be clarified that, according to Article 32 of the LH, geologic, geophysical, and petrochemical information belongs to the nation.

⁶ www.dof.gob.mx/nota_detalle.php?codigo=5382838&fecha=20/02/2015.

⁷ General Transparency Act, Article 49. The guaranteeing organizations will develop, adopt, implement, and put the electronic platform into service that makes it possible to comply with the procedures, obligations, and rules set forth in this present law for the obligated subjects and guaranteeing organizations, in accordance with the standards and regulations that are established by the national system, in conformity with the needs of accessibility of users.

⁸ Africa Freedom of Information Center (Kampala/Africa), *et al.*, The global principles on national security and the right to information (Open Society Foundation, 2013). *Amparo* proceeding for review 173/2012, Paragraph 207. Reporting Judge: Judge José Ramón Cossío.

⁹ This is a recommendation that is reiterated both by the Extractive Industries Transparency Initiative (EITI) as well as by Braithwaite y Drahos (2000).

¹⁰ See www.acfe.com/rtnn/docs/2014-report-to-nations.pdf and the Extractive Industries Transparency Initiative (EITI).

¹¹ On repeated occasions, the court has ruled with respect to the standard of the administrative processes of liabilities, indicating that the standard must be the same as that for criminal processes. This has been established in different jurisprudential theses. For example: “Administrative responsibility of public officials. The principle of congruence in the ruling of the respective resolution governs with the same scope as under criminal law.”

“Administrative responsibilities of public officials. Article 21, Section I, of the respective federal law does not violates the guarantee of a hearing.” Record No. 168557, isolated thesis, Second Tribunal: www.scjn.gob.mx.

¹² www.acfe.com/rtnn/docs/2014-report-to-nations.pdf. In the Executive Summary, it states the following: “Tips are consistently and by far the most common detection method. Over 40 percent of all cases were detected by a tip, more than twice the rate of any other detection method. Employees accounted for nearly half of all tips that led to the discovery of fraud.”